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5-21-14



**ALESHIRE &
WYNDER** LLP
ATTORNEYS AT LAW

MEMORANDUM

TO: FRESNO CITY PLANNING COMMISSION

FROM: JOHN W. FOX

DATE: MAY 16, 2014

**RE: RESOLUTION DENYING APPEAL AND GRANTING REVOCATION
OF SITE PLAN NO. S-96-76 AND MAJOR REVISED EXHIBIT NO. S-
11-57**

Attached to this memorandum is a draft Planning Commission Resolution that serves to formalize the Commission's April 16, 2014 decision to deny the appeal of Michael Occhionero and Vincenza Occhionero of the Development and Resource Management Department Director's revocation of Site Plan S-96-76 and Major Revised Exhibit No. S-11-57 and to approve the revocation of those special permits. The Planning Commission will have an opportunity to consider the draft resolution at its May 21, 2014 meeting. During that consideration, the Chair of the Commission and each Commissioner can request changes, deletions or additions to the draft resolution prior to the Commission adopting the final resolution. I will attend that meeting to respond to any questions or comments made regarding the draft resolution and to facilitate any requested changes to the draft resolution.

**FRESNO CITY PLANNING COMMISSION
RESOLUTION NO.**

The Fresno City Planning Commission adopted the following resolution at its regularly scheduled meeting of May 21, 2014, pursuant to a proceeding instituted by the Development and Resource Management Department ("DARM") Director's decision to revoke Site Plan Review No. S-96-76 and Major Revised Exhibit No. S-11-57.

PROJECT: Revocation of Site Plan Review No. S-96-76 and Major Revised Exhibit No. S-11-57.

PERMITTEES AND APPELLANTS: Michael Occhionero and Vincenza Occhionero, current owners of the "Subject Property" located at 2680 N. Miami Avenue, Fresno, California

LOCATION: The southeast corner of Miami Avenue and E. Brown Street in the City of Fresno.

SITE SIZE: .52 acres

EXISTING ZONING: M-1 (Light Industrial)

EXISTING LAND USE: Warehouse and outside material storage

WHEREAS, on July 31, 1996 the Development Director conditionally approved Site Plan Review Application No. S-96-76 as evidenced by correspondence dated August 5, 1996 for the property located at 2680 N. Miami Avenue, Fresno, California, approximately .52 acres in size for applicants/permittees/appellants, Michael Occhionero and Vincenza Occhionero, and,

WHEREAS, Site Plan Review No. S-96-76 permitted the construction of a 5,000 square foot office/warehouse building and open storage of baled recycled products in certain designated areas; and,

WHEREAS, on October 28, 2011 the City's Planning Director approved Site Plan Review Application No. S-11-057, a Major Revised Exhibit for the Subject Property subject to the conditions of approval; and,

WHEREAS, Site Plan Review No. S-11-057 permitted the operation of an indoor/outdoor storage facility for polyurethane products for future recycling purposes as well as permitting a limited storage area for other recyclable materials, subject to the conditions of approval; and,

WHEREAS, on February 27, 2014, the Director of the Development and Resource Management Department revoked Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057 for the reasons set forth in the Order and Notice of Permit Revocation of: Special Permit Nos. S-96-76 and S-11-057; and,

Planning Commission Resolution No.

Revocation of Site Plan Review No. S-96-76 and Major Revised Exhibit No. S-11-57

May 21, 2014

Page 2

WHEREAS, on February 28, 2014 Appellants, through their attorney, filed a timely appeal of the DARM Director's revocation of the Special Permits which resulted in the matter being set for hearing on April 2, 2014, and continued and concluded April 16, 2014; and,

WHEREAS, on April 2, 2014 prior to commencement of the hearing on the appeal of revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057, the Fresno City Planning Commission considered and, after receiving comment from counsel representing the Appellants and the Development and Resource Management Department, adopted the Procedures for Special Permit Revocation Proceeding which established the format and procedures for conducting the hearing on the appeal of the revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057; and,

WHEREAS, during the hearing on the appeal of the revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057 the Fresno City Planning Commission received a staff report, sworn oral testimony, written testimony and documentary evidence submitted on behalf of the Community Revitalization Division of DARM and on behalf of the Appellants regarding the revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057 and the appeal thereof; and,

WHEREAS, the Fresno City Planning Commission has considered all relevant evidence presented in the court of the public hearing and makes the findings and decisions herein, based solely upon that evidence.

NOW, THEREFORE, BE IT RESOLVED that the appeal is hereby denied, the revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057 is granted, and the denial of the appeal and granting of the revocation is based upon the following evidence, findings, and conclusions:

1. The recitals contained herein are true and correct.
2. The notice of revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057 was given in accordance with the requirements of Fresno Municipal Code, section 12-405.
3. The Appellants, through their attorney, duly filed a timely appeal of the action of the Development and Resource Management Department's revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057.
4. During the Planning Commission hearing on the appeal of the revocation of Site Plan Review No. S-96-76 and Site Plan Review No. S-11-057 the Planning Commission followed the Procedures for Special Permit Revocation Proceeding.
5. In 1996 Appellants filed an site plan review application no. S-96-76 for the Subject Property to permit the construction of a 5000 square foot warehouse and permitted in-door warehousing and baling

of foam plastics and out-door storage of baled recycled products. On or about July 31, 1996 the Development Director approved Site Plan Review Application S-96-76. S-96-76 permitted in-door storage up to a height of six (6) feet without an automatic fire sprinkler system. Site Plan S-96-76 allowed for outdoor storage of baled recycled products subject to the following location and height restrictions: (1) no storage permitted within three (3) feet of any property line; (2) storage up to a height of six (6) feet was permitted between three (3) feet and ten (10) feet of any property line; (3) storage up to a height of twenty (20) feet was permitted at distances ten (10) feet and greater from any property line. Site Plan S-96-76 required eight (8) parking spaces.

6. After Site Plan Review Application S-96-76, the Subject Property was the subject of the following Code Enforcement actions commencing in 2003:

6.1 The City issued Administrative Citations on May 1, 2003, May 20, 2003, June 10, 2003 and June 26, 2003 for various violations of the Fresno Municipal Code related to the unauthorized relinquishment, reduction, or alteration of the parking area via storage of used materials.

6.2 On April 2, 2004 the City issued a Notice and Order requiring Appellants to correct various violations of the Fresno Municipal Code related to the following: (1) Illegal use of land: consisting of the relinquishment, reduction or alteration of the parking area or parking space, including the driveway, and (2) Illegal use of land: consisting of the relinquishment or reduction of the loading space via storage of polyurethane, scrap, wood, car parts, cardboard and other miscellaneous items.

6.3 On November 5, 2009 the City issued a Notice & Order and Compliance Order Pursuant to FMC 10-418.c requiring Appellants to correct various violations of the Fresno Municipal Code at the Subject Property including: (1) the presence of rubbish or junk (including but not limited to) refuse, cardboard, foam, and miscellaneous items located throughout the property; (2) Failure to submit an application and permit fee for a Solid waste/Recycling Facility Permit; (3) Illegal use of land: consisting of the relinquishment, reduction, or alteration of the parking area or parking spaces, including the driveway as designed on site plan for Subject Property (S-96-76); (4) failure to comply with Conditions of Approval under Site Plan No. S-96-76. After this Notice & Order was upheld by the City's Administrative Hearing Officer. The Appellants filed a lawsuit against the City challenging the Notice & Order and the decision of the Administrative Hearing Officer.

At the revocation hearing Senior Community Revitalization Specialist Richard Salinas testified that the Appellants never successfully challenged any of the citations or Notices & Orders. Appellants failed to present any evidence to contradict this testimony of Mr. Salinas.

7. As part of the settlement of Appellants' lawsuit arising out of the Notice & Order issued on November 5, 2009, Appellants agreed to apply for a Major Revised Exhibit to Site Plan No. S-96-76 which was given the number S-11-057. On or about October 28, 2011 the Planning and Development Director approved Major Revised Exhibit No. S-11-057. Among other changes, S-11-057 reduced the number of required parking spaces from eight to two, delineated the approved areas for outdoor open storage of sorted and/or baled materials and products and included a new condition for exterior storage that "Maximum storage height shall not exceed the height of the fence."

8. On or about October 24, 2013 the City issued a Notice and Order to the Appellants alleging the following violations:

8.1 Materials stored throughout the property which are not approved under Site Plan No. S-11-057, including but not limited to scrap metal, appliance, bed frames, televisions and other electronic devices.

8.2 Materials stored in unapproved areas including, but not limited to, the driveways and ingress and egress lands, as well as in the required parking stalls; and areas immediately next to the building on the property as well as beyond the height of the fence surrounding the property.

8.3 The unauthorized relinquishment of parking stalls required under the Conditions of Approval under Site Plan No. 11-057, by storing various materials in the areas designated for required parking and for accessing the required parking stalls on the Subject Property.

8.4 The landscaping on the property is not being maintained.

8.5 The business owner and property owners have maintained a public nuisance at the subject property by failing to comply with the conditions of approval under Site Plan No. S-11-057, which is in violation of the Fresno Municipal Code, sections 12-411.A&B.

The Notice & Order required that the identified violations be corrected by November 13, 2013. The Appellants did not appeal this Notice & Order and failed to correct the violations set forth in the Notice & Order by November 21, 2013, the date an Inspection & Abatement Warrant was issued by the Fresno Superior Court to allow the City to enter the property to abate the violations that constituted a Public Nuisance.

9. On December 16, 17 and 18 of 2013 the City abated the violations that constituted a Public Nuisance by removing from the Subject Property materials and other items that the City determined contributed to the violations set forth in the Notice & Order issued on October 24, 2013. During the revocation hearing the Appellants disputed whether the City properly executed the abatement warrant claiming that the City removed items and materials that the Appellants were permitted to store on the Subject Property.

10. The proposed revocation of the Special Permits is categorically exempt from the requirements of CEQA pursuant to Section 15321 of Title 14 of the California Code of Regulations. Furthermore, none

of the exceptions to the use of this exemption set forth in Section 15300.2 of Title 14 of the California Code of Regulations apply to the Planning Commission's action to revoke these Special Permits.

11. Fresno Municipal Code, section 12-405-E grants the DARM Director the authority to revoke special permits and the grounds for revoking them, stating:

REVOCATION OF RIGHTS. The Director may revoke the rights granted by such special permit and the property affected thereby shall be subject to all of the provisions and regulations of this Zoning Ordinance applicable as of the effective date of revocation. Such revocation shall be for good cause including, but not limited to, the failure to comply with conditions or complete construction as required by subsection C, the failure to comply with any condition contained in the special permit, failure to comply with the general sign provisions of Sections 12-1701 through 12-1718 and the Outdoor Advertising provisions of the zone district for which the special permit was granted, or the violation by the owner or tenant of any provision of this Code pertaining to the premises for which such special permit was granted.

12. In the Notice of the revocation of Site Plan and Major Revised Exhibit Nos. S-96-76 and S-11-57 dated February 27, 2013 the DARM Director set forth several grounds for the revocation of Site Plan S-96-76 and Major Revised Exhibit No. S-11-57, any of which, if found true, would in an of itself be sufficient based for the revocation of Site Plan S-96-76 and Major Revised Exhibit S-11-57. These grounds are generally the following:

12.1 The Property Owners and Business Owner have consistently stored unsorted, non-baled and unapproved materials in a disorderly manner throughout the Subject Property in violation of the conditions of approval under Site Plan No. S-96-76 and Major Revised Exhibit No. S-11-057.

12.2 The Property Owners and the Business Owner have consistently relinquished the parking stalls required under the Conditions of Approval under Site Plan No. S-96-76 and Major Revised Exhibit No. 11-057, by storing various materials in the areas designated for required parking, as well in the areas designated for ingress and egress for the Subject Property.

12.3 The Property Owners and Business Owners have failed to maintain the landscaping no the Subject Property.

12.4 The Property Owners and Business Owner have maintained a public nuisance at the subject property by failing to comply with the conditions of approval under Site Plan No. S-96-76 and Major Revised Exhibit No. S-11-057.

12.5 The business owner have consistently maintained a public nuisance at the Subject Property by failing to comply with the conditions of approval under S-96-76 and S-11-57, noted above, as well as with the Notice and Order issued October 24, 2013, Items 10.1 through 10.4.

12.6 The Property Owners and Business Owner have maintained a public nuisance at the Subject Property by consistently failing to comply with Conditions of Approval under S-96-76 and S-11-57, to the extent that the City was compelled to conduct a costly and extensive administrative abatement of the Subject Property.

13. The Commission finds that the weight of the evidence and substantial evidence supports the DARM Director's statement that the Appellants consistently stored unsorted, non-baled and unapproved materials in a disorderly manner throughout the Subject Property in violation of the conditions of approval under Site Plan No. S-96-76 and Major Revised Exhibit No. S-11-057. This is based upon all of the evidence presented during the revocation hearing, including the following:

13.1 Planning Manager Mike Sanchez testified that S-11-57 required that the materials and products stored outdoors be sorted and/or baled. This testimony was confirmed by a notation on the actual site plan setting forth this requirement.

13.2 Fresno Fire Department Fire Prevention Inspector II, Mark Guardado, authenticated pictures taken of the Subject Property on October 16, 2013 showing large piles of unsorted materials, products and other debris.

13.3 Senior Community Revitalization Specialist Richard Salinas authenticated additional photographs of the Subject Property on various dates showing large piles of unsorted and unbaled materials, products and debris.

13.4 Mr. Salinas stated that when he entered the Subject Property on December 16, 2013 to start to abate the violation of the Fresno Municipal Code, as set forth in the Notice & Order dated October 24, 2013 he observed many items contained in the large unsorted piles that fell within the definition of "solid waste" as that term is defined by California Public Resources Code, section 40191. Mr. Salinas further testified that in order to maintain said items on the Subject Property, the City would have had to issue a Conditional Use Permit for the operation of a Solid Waste Transfer Station. Mr. Salinas stated that the City has not issued a Conditional Use Permit for a Solid Waste Transfer Station to operate at the Subject Property.

13.5 Various owners of property and businesses located near the Subject Property that for many years they had observed large piles of unsorted materials and products at the Subject Property which were so unsightly that it caused prospective tenants to choose not to locate in buildings in the vicinity of the Subject Property.

The Commission was not persuaded by the evidence and arguments made by the Appellants attorney to the effect that because the term "sorted" was not defined in the Fresno Municipal Code it was vague and ambiguous and could not serve as the basis for the City to find that the Appellants violated S-11-57. The Commission has concluded that the large piles of material, product or debris depicted in the photographs presented to the Commission could not reasonably be categorized as "sorted" based upon any reasonable interpretation of the meaning of that term.

14. The Commission finds that the weight of the evidence and substantial evidence supports the DARM Director's statement that the Appellants consistently relinquished the parking stalls required under the Conditions of Approval under Site Plan No. S-96-76 and Major Revised Exhibit No. 11-057, by storing various materials in the areas designated for required parking, as well in the areas designated for ingress and egress for the Subject Property. This is based upon all of the evidence presented during the revocation hearing including the following:

14.1 Planning Manager Mike Sanchez testified that S-96-76 required eight (8) parking spaces on the Subject Property and that S-11-57 reduced the number to two (2) parking spaces. Mr. Sanchez further testified as to the limitations on the placement and height of outdoor storage of materials and products. He testified that both S-96-76 and S-11-57 stated that no storage was permitted within three feet of the property line; storage was permitted up to a height of six (6) feet between three (3) feet and ten (10) feet of the property line and that storage was permitted up to a height of twenty (20) feet if located more than ten (10) feet from the property line. However, Mr. Sanchez also testified that S-11-57 contained an additional condition that required all outdoor storage regardless of its location on the Subject Property to not exceed the height of the fence. Mr. Sanchez testified that the height of a standard fence is six (6) feet. As such, outdoor storage would not be permitted to exceed that height unless the Appellants applied for and were granted a variance for an over-height fence. If such a variance were granted, the maximum storage height would be the height of the approved over-height fence.

14.2 Fresno Fire Department Captain Reginald Zellous testified that on November 2, 2012 he was conducting a routine inspection of a fire hydrant located to the north of the Subject Property. While conducting this inspection he observed that foam rubber and carpet padding were being stored on the Subject Property in large piles that exceeded the height of the fence. He stated that manner in which this material was being stored it was blocking the ingress/egress into the Subject Property which would not permit the Fire Department to safely enter the subject property to fight a fire should these materials catch fire. He stated that if the materials, as stored at that time, were to catch fire it would result in what he described as a "catastrophic" event that would significantly and detrimentally effect air quality in the vicinity of the fire. Captain Zellous stated that upon observing this condition he contacted the City's Code Enforcement Division to report it.

14.3 Fresno Fire Department Fire Prevention Inspector II Mark Guardado testified that on October 16, 2013 he visited the property and took pictures which he showed to the Commission of material, product and debris up against the fences and building located on the Subject Property, in clear violation of S-11-57 requirement to maintain a five (5) foot clearance from the building and a three (3) foot clearance from the fence to allow access for fire fighting personnel. The photographs he presented to the Commission also showed that the piles of material, product and debris clearly exceeded the height of the fence.

14.4 Senior Community Revitalization Specialist Richard Salinas testified and showed the Commission numerous photographs taken at various times after the City approved S-11-57 showing that the outdoor storage of the material, product and debris on the Subject Property failed to comply with the clearance and height requirements set forth in S-11-57 and S-96-76 and continued to fill the two (2) required parking spaces.

14.5 Various owners of property and businesses located near the Subject Property that for many years they had observed large piles of unsorted materials and products at the Subject Property which were placed up against the fence and the building.

The Appellants presented still shots of video taken of the Subject Property before and during the City's abatement of the Subject Property that commenced on December 16, 2013. The Appellants contended that these still shots demonstrated that at the time of the City's abatement, the Appellants were in compliance with the outdoor storage clearance and height requirements set forth in S-11-57 and S-96-76. The Commission is not persuaded that these still shots support that the Appellants were in compliance with the outdoor storage clear and height requirements of S-11-57 and S-96-76 as the piles still appeared to exceed the height of the fence and the piles also continued to block the ingress/egress required by the site plans.

15. The Commission finds that the weight of the evidence and substantial evidence does not support the DARM Director's statement that the Appellants consistently failed to maintain the landscaping on the Subject Property. The evidence consisted of a photograph showing what appeared to be a dead tree and testimony from Mr. Salinas that there was no water service to the Subject Property to water the landscaping. However, the Appellants presented testimony from Mr. Paul Saito that the Appellants had planted the oleander bushes required by S-11-57 and testimony from Appellants son Greg Occhionero that he had found an alternative means to water the landscaping, that the oleander bushes were still alive and growing and that he was aware of only one small tree that might be dead. The City failed to provide additional evidence to rebut the testimony of Mr. Saito and Mr. Occhionero.

16. The Commission finds that the weight of the evidence and substantial evidence supports the DARM Director's statement that the Appellants have maintained a public nuisance at the subject property by failing to comply with the conditions of approval under Site Plan No. S-96-76 and Major Revised Exhibit No. S-11-057 pursuant to Fresno Municipal Code, sections 12-411A&B and 10-604.j&l as these code sections state that a violation of condition of approval of a special permit is a violation of the City's zoning ordinance and that a violation of the City's Zoning Ordinance is per se a public nuisance. As set forth in paragraphs 6, 8, 13 and 14, the weight of the evidence and substantial evidence support the determination that the Appellants have routinely violated various conditions of approval set forth in S-11-57 and S-96-76.

Planning Commission Resolution No.

Revocation of Site Plan Review No. S-96-76 and Major Revised Exhibit No. S-11-57

May 21, 2014

Page 9

Based upon the foregoing and all of the evidence set forth in the record of proceedings for the revocation hearing, the Commission finds that the weight of the evidence and substantial evidence provide good cause for the revocation of Site Plan Review No. S-96-76 and Major Revised Exhibit No. S-11-57, and hereby revokes Site Plan Review No. S-96-76 and Major Revised Exhibit No. S-11-57.

The foregoing Resolution was adopted by the Fresno City Planning Commission upon a motion by Commissioner _____, and seconded by Commissioner _____.

VOTING : Ayes
 Noes
 Not Voting
 Absent

DATED: